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ABSTRACT

The Federal Communications Commission (FCC) of the late 1980s appeared to pursue its own agenda of broadcast deregulation, notwithstanding congressional pressures. The apparent power shift is evident in a case study of the interactions between Congress and the FCC on the subject of children's television. In the early 1970s, the FCC tended to accede to Congress and other regulatory players with regard to children's television. In the second half of the decade, too, Congress used oversight, subcommittee, and appropriations hearings to let the FCC know where it stood on broadcast policy and the FCC generally complied with Congress' regulatory goals. In the deregulatory mood of the early 1980s, the children's television issue was assigned a low priority at the FCC. In Congress, Democrats fought for greater regulation, and continued to do so through the decade. Lawmakers criticized the FCC for failing to pursue the matter. Efforts to increase television regulation either died in congressional committee or were vetoed by President Reagan. The FCC's alliance with the President allowed the commission to ignore pro-regulatory moves from Congress, the courts, and citizens' groups alike. Since President Bush took office, Congress has approved limits on the commercialization of children's television and the FCC has supported such moves. (Sixty-nine endnotes are included.) (SG)

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CONGRESS, THE FCC AND CHILDREN'S TELEVISION REGULATION: A SHIFT IN THE BALANCE OF POWER

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Introduction

The literature about broadcast regulation has portrayed Congress as one of the most powerful -- perhaps the most powerful -- of the players in the regulatory process. In particular, the federal legislature has been said to wield considerable power over the Federal Communications Commission. The chairs of the congressional committees that deal with broadcasting have had great influence over the agency, where their word has been considered law.[1]

The regulatory process has been described as negotiation among at least six players: Congress, the FCC, citizen groups, the White House, the broadcast industry and the courts.[2] However, only Congress and the FCC are empowered to establish regulations formally: the FCC through agency rulemaking and policy-setting, and Congress through statutes. The other players operate by reacting to established policy or pressing for the establishment of new policy.

The relationship between the FCC and Congress invited study because regulatory developments suggested a power shift. Instead of bowing to congressional pressure, the FCC of the late 1980s appeared to have pursued its own agenda of deregulation, ignoring congressional attempts to reinstate by statute what the FCC had slashed from agency policy. For example, Congress tried in 1987 to codify the Fairness Doctrine, which the FCC had repealed. The Fairness Doctrine required broadcast stations to present programming about controversial issues of public importance and to provide opportunities for presentation of contrasting views on such issues. President Ronald Reagan vetoed

the legislation, and the Fairness Doctrine remains abolished. Another possible example of this power shift in the late 1980s was the FCC's refusal to reinstate standards for children's television programming despite Congress' repeated but unsuccessful attempts to force such regulation through statutes.

The state of the balance of power in the broadcast regulatory dynamic is important to those who want to influence the process. In addition, regulatory developments of the late 1980s highlighted the weakness of the reputedly powerful Congress as a player in the regulatory process -- a situation previously unexplored by the literature.

Methodology

This article will examine the apparent power shift through a case study of the interactions between Congress and the FCC on the subject of children's television. Children's television was selected for scrutiny because the topic has attracted the attention of regulators for more than two decades and continues to do so. Thus ample materials exist to trace the interaction of the FCC and Congress over time on this issue. Congressional and FCC activity in the years 1975 through 1979 will be contrasted with activity in 1985 through 1989. This will allow scrutiny of recent regulatory activity regarding children's television, as well as comparison of this activity with events occurring before Reagan brought his brand of deregulation to the federal scene.

Transcripts of congressional hearings and bills will be reviewed to determine what Congress' agenda for children's programming was during each time period. FCC documents will be

examined to determine the extent to which the agency complied with Congress' desires. Court cases and some secondary sources also will be examined to determine what the other players in the regulatory process were doing.

Interaction between the FCC and Congress raises the following questions, which will be the focus of this study:

1. What is the FCC's regulatory agenda?
2. What is Congress' regulatory agenda?
3. Who has prevailed? Why?
4. What implications does this result have for broadcast regulation?

The study will not be a normative one; many other commentators have discussed whether children's programming ought to be regulated.[3] Instead, this study will document the shift that has occurred in Congress' relationship with the FCC, attempt to formulate some explanations and assess the impact of the change.

Case study methodology does, of course, have limitations. The findings of such a study cannot be generalized to other issues. However, the methodology does provide an opportunity for scrutiny of the regulatory process.

Review of the Literature

Although much of the literature about broadcast regulation mentions Congress' participation in the process, little work has focused specifically on Congress' unique role in regulation. Studies that have emphasized Congress' role, however, have depicted the federal legislature as one of the most powerful

players in the broadcast regulatory process. A review of some of the most pertinent articles follows.

Timothy B. Dyk and Ralph E. Goldberg argued forcefully in 1987 that Congress has, at times, overstepped the bounds of its investigatory authority. They claimed Congress has investigated when it had no intention of enacting legislation and where there was no possibility of enacting constitutional legislation. They said Congress has used investigations into programming in attempts to intimidate broadcasters into abandoning protected practices such as exit polling. Congress also has used "lifted eyebrow" regulation -- that is, pressure for "voluntary" compliance -- on the FCC, which in turn has pressured broadcasters to meet congressional demands. It is widely believed that congressional investigations have a significant impact on broadcasters, Dyk and Goldberg stated.[4]

In a similar vein, Harry M. Shooshan III and Erwin G. Krasnow argued in 1987 that the once-independent FCC had been reduced in that decade to a "level of abject dependency" in its relationship with Congress. They noted that Congress can control not only how much money the FCC gets but how it is used as well. They also stated that the FCC was more vulnerable than most independent regulatory agencies to pressures from individual members of Congress because it lacked clear legislative guidance in the Communications Act regarding the definition of "public interest."[5] In an earlier piece, Krasnow and Shooshan described Congress' power over the commission as "pervasive and multifaceted."[6]

Literature regarding children's television policy is abundant and can be divided into two broad categories: articles that argue for or against regulation of children's television, and articles that present a non-normative examination of regulatory policy aimed at children's television. Those in the latter category are relevant to this study and will be reviewed here.

David E. Tucker and Jeffrey Saffelle used the Krasnow-Longley-Terry model to examine the actions of the six regulatory players with regard to children's television from 1970 through 1981. The paper chronicled efforts by the citizen group Action for Children's Television (ACT) to get guidelines for children's programming established and its interactions with the other players.[7] A subsequent article examined the FCC's 1983 ruling that there was no need for a national quantitative children's programming policy. The article noted ACT's persistence in pushing for regulation, continuing interest by some members of Congress in regulation and the FCC's quest for an unregulated marketplace.[8] The evolution of children's television regulatory policy was discussed in a 1987 article by Dale Kunkel and Bruce Watkins. The article examined the growth of research on children and television, congressional interest in the topic, the efforts of ACT, the FCC's deregulatory stance and possible future developments.[9]

None of the articles, however, examined the issue of children's television specifically from the perspective of the balance of power between Congress and the FCC -- the two players empowered to pass formal regulations. They did not focus on what

happens to the regulatory process when one of these players decides not to regulate. Kunkel and Watkins noted in their 1987 article about children's television regulatory policy that the complex structure of Congress made broadcast regulation by the federal legislature difficult and therefore unlikely. They did not, of course, deal with subsequent developments that support their claim. This study picks up where Kunkel and Watkins left off in that article, by showing that as Congress and the FCC drifted apart in their regulatory goals, Congress used more blunt tactics in its efforts to bring the FCC into compliance but still failed. It will also look at why Congress failed in its attempt to set FCC policy in the late 1980s. It will be shown that the failure stemmed in part from the difficulty of successfully guiding regulatory bills over legislative hurdles.

The Regulatory Process

The FCC and Congress are not, of course, the sole determiners of broadcast regulatory policy. The Krasnow-Longley-Terry model of broadcast regulation identifies six determiners of policy. In addition to Congress and the FCC, they are the broadcast industry, citizen groups, the courts and the White House.[10] However, because the emphasis in this paper will be on Congress and the FCC, a detailed discussion of their roles is warranted.

The FCC's Powers

The FCC was formed "for the purpose of regulating

interstate and foreign commerce in communication so as to make available ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service."[11] The agency controls the licensing of broadcast stations[12] and is empowered to regulate "as public convenience, interest or necessity requires,"[13] which means the commission has the ability to make and enforce rules. The regulatory approach is commonly called a "trusteeship model" in that those who receive broadcast licenses are seen as trustees of publicly owned airwaves, which are limited in quantity.[14]

Commission policy is made in several ways: through formal rulemaking, through case decisions, on an ad hoc basis without formal procedure and through the "raised eyebrow" approach in which it informally expresses disapproval of a certain practice.[15] It will be seen that the FCC of the late 1980s stated its deregulatory policy for children's television explicitly. Policy is shaped by pressures from other regulatory players.

Programming policy is seldom enforced through overt measures such as fines or license revocation, although the commission is authorized to use these tactics. More often, the FCC will issue policy statements, and broadcasters will take heed. However, citizen groups can bring enough pressure to change station policy by challenging a renewal.[16]

The commission is required to submit to Congress an annual report that outlines its goals, evaluations of the preceding year's work and recommendations for legislative action to help the FCC meet its objectives.[17] Members of Congress have

sometimes used appropriations hearings as a forum for communicating their policy preferences to the FCC, but there is some evidence that Congress' control of the purse strings may be less influential now than in the past. For example, Mark S. Fowler, Reagan's appointee for chairman, exerted power by questioning the commission's existence and reducing its staff size.[18]

Congress' Powers

Congress can exert control over the FCC in several ways: by statute, by appropriation, by investigation, through commissioners' appointment hearings, through scrutiny by standing committees, through pressure by individual lawmakers and their staff members and through legislative inaction. Traditionally, however, nonstatutory controls have been the most commonly employed.[19] Commentators who explored the extent to which Congress used nonstatutory pressure stated: "[F]ew doubt that congressional investigations have a significant impact on broadcasters."[20]

Congress and the FCC: The 1970s

Background: 1970-1974

Events in the early 1970s illustrated Congress' effective use of nonstatutory methods to influence the FCC. Lawmakers became concerned when, in 1974, acts of violence portrayed on television reached an all-time high and the FCC received 25,000 letters about the subject -- up 2,000 from 1972. They directed the FCC to report at year's end on specific actions taken to

remedy the perceived problem of obscenity and violence on television. FCC Chairman Richard E. Wiley subsequently met with broadcasters, and the result was the so-called family viewing policy. This policy, adopted by the National Association of Broadcasters, stipulated that the first hour of network prime-time programming had to be suitable for viewing by all members of the family.[21]

This relationship between Congress and the FCC was characteristic of the first half of the 1970s. The regulatory climate was one in which the FCC reacted to other players. For example, responding to pressures from Congress and Action for Children's Television, a citizen group, the FCC issued its Children's Television Report and Policy Statement of 1974.[22] The policy statement, which asserted that broadcasters had a duty to further the educational and cultural development of children, asked licensees to fulfill this duty in several ways, such as reducing advertising during children's programs and separating commercials from programs. The statement intimated that compliance would be considered at license renewal time. Although the policy statement did not impose quantitative requirements on programming and commercials, it nonetheless indicated the FCC's willingness to regulate the content of children's television programming by promulgating guidelines.

Years Under Scrutiny: 1975-1979

Congress and the FCC

Transcripts of congressional hearings that involved the FCC

in the years 1975 to 1979 revealed that this time period was no different; Congress used oversight hearings, subcommittee hearings and appropriations hearings to let the FCC know where it stood on broadcast policy. These hearings generally did not involve discussion of a specific legislative proposal. The picture of the relationship between Congress and the FCC that emerged from these hearings is one of a commission that attempted to respond to congressional goals, albeit not always in a fashion that pleased lawmakers. But the two seemed to be headed in the same direction, with the FCC sometimes proceeding in a slower or more roundabout way than some members of Congress would have preferred.

The Senate's Committee on Commerce met in April 1975 for its "customary annual review of the past actions and future objectives of the Federal Communications Commission."[23] Sen. John O. Pastore, the presiding officer at the hearing, noted the committee's interest in FCC actions in the area of children's television. Wiley, then chairman of the FCC, subsequently reported to the committee that programming for children had been a major concern for the commission, a concern that culminated in the Report and Policy Statement of 1974.[24] The report established two main guidelines for programming and advertising designed for youthful audiences: Stations should provide a reasonable amount of programming for children, and the amount of advertising during such programming should be reduced and a clear separation between program material and commercial established. The commission enforced the policy by modifying its television license renewal form to obtain information about

programs for children and about past and proposed commercial practices during these programs, Wiley told the committee.[25]

Wiley also discussed the commission's publication of a "Report on the Broadcast of Violent, Indecent and Obscene Material."[26] He said the report was prepared "in response to requests from this committee and others in Congress, studies on the harmful effects of televised violence on children, and a growing number of complaints concerning this type of programming."[27] The report explored the kinds of steps that might be taken to prohibit the broadcasting of obscene and indecent material, and what could be done to shield children from other sexually oriented or violent material that might be deemed inappropriate for them. As a result of the study, the FCC issued a declaratory order clarifying the use of the term "indecent" in the statute that forbade the broadcast of profane, indecent or obscene language, Wiley testified.

Clearly, this oversight hearing showed that the FCC responded to the concerns of Congress and made appropriate policy changes. The hearing also illustrated that Congress employed a nonstatutory method of influencing the FCC -- that of summoning the commission chairman to testify before a committee.

Later that year, the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce conducted four days of hearings to consider broadcast advertising and children. Committee members used this session to grill Wiley about commission policy regarding children's television. At one point, Rep. Torbert Macdonald asked Wiley, "Speaking of things that disappear without any sign of a trace that I could find

out, what happened to the coordination between yourself and the Children's Unit which was set up?" Wiley responded that the commission's children's television unit did not exist as a separate department but that some personnel continued to pay particular attention to the issue.[28] Wiley later was asked why the FCC had not appointed a child behavioral scientist to its staff.[29]

Congressional muscles certainly were flexed at this subcommittee hearing. These events lend support to the Krasnow, Longley and Terry observation that standing committees such as the Subcommittee on Communications can exert much influence simply by conducting hearings, and that the FCC heeds suggestions made during such hearings.[30]

Concerns about how sex and violence on television might affect children were aired at congressional hearings in 1976. Sen. Frank E. Moss opened a hearing in Salt Lake City, Utah, with comments about the possible harm that could come to children who viewed televised violence: "The Surgeon General's expert advisory panel reported to our Senate committee in 1972 that 'the causal relationship between televised violence and antisocial behavior is sufficient to warrant appropriate and immediate remedial action.'" The statement left little doubt as to where Moss stood on the need to regulate violence on television.[31]

Later that year, the House, deeming the broadcast industry's self-regulation a failure, began its own quest for an answer to the "thorny problem" of trying to control violence and obscenity on television without engaging in censorship.[32] It

conducted three days of hearings that were prefaced by Rep. Timothy E. Wirth's noting that the American Medical Association had labeled televised violence a health threat and yet another reference to the surgeon general's report.[33] The needs of child audiences were a recurrent theme at the hearings.

Debate over violence and obscenity on television raged on into 1977, with the special needs of children continuing to serve as a focal point. At a hearing to consider television broadcast policies, Sen. Ernest F. Hollings indicated that Congress was prepared to take an active role in regulating television programming content:

> If ... charges of excessive violence, sexuality, obscenity, and lack of special attention to the needs of children and teenagers and failure to fully implement equal employment policies are well founded, then the broadcasting responsibilities are not being met and remedial action would be considered. When appropriate, we are fully prepared to improve the broadcaster's ability to serve the public.[34]

Finally, at an appropriations hearing, Wiley was questioned about the FCC's activities regarding children's programming, the family viewing hour, its research efforts on the effects of television on children and commercial standards for children's programs.[35]

Wiley's experience at the appropriations hearing was typical of Congress' treatment of the FCC throughout the latter half of the 1970s. Rather than express their views on broadcast policy by introducing proposed legislation, lawmakers conducted

hearings at which they interrogated Wiley and questioned other witnesses who ranged from students to teachers to network officials. Through their questions and comments, legislators' positions on regulation of children's television programming became clear: The topic should be placed at the top of the FCC's agenda.

Other Regulatory Players

The White House apparently did not exert great influence over the FCC in the latter half of the 1970s. Two presidents served during this period, Gerald Ford and Jimmy Carter. Both advocated a move away from government regulation generally, but neither seemed to pay particular attention to communication policy.

Ford's support for deregulation focused on repeal of government regulations that inhibited competition and burdened business, but no evidence could be found of any Ford initiatives regarding communications policy. The chairman of the FCC under Ford was Wiley, who reflected the president's moderately deregulatory and pro-business stance. Wiley frequently managed to rally commissioners to consensus, and produced four times the number of decisions of any previous administration of similar duration.

Carter also made regulatory reform a goal, but focused much of his attention on the airline industry rather than communications. In fact, the Carter administration eliminated the Office of Telecommunications Policy created by President Richard M. Nixon -- a move viewed by some as downgrading the

importance of communications issues. Carter's apparent lack of interest was characteristic of previous presidents.[36]

Carter appointed Charles Ferris chairman of the FCC. Ferris failed to win the same commission support that his predecessor, Wiley, had. However, Ferris carried out deregulatory programs favored by Carter and was attentive to citizen complaints.[37]

The premier citizen group in children's television regulation, ACT, was active during the late 1970s. It was dissatisfied with the Report and Policy Statement of 1974 because of its lack of quantification requirements and filed suit in the U.S. Court of Appeals in 1976. The following year, the court ruled that the FCC's decision not to impose quantification requirements was a legitimate exercise of agency discretion.[38] By filing lawsuits, testifying before Congress and petitioning the FCC for policy changes, members of ACT managed to win attention for their cause. The group helped make the quality of children's television a subject of public debate and a concern of policymakers.

Also during this time period, broadcasters responded to pressure from Congress and the FCC by establishing the family viewing hour. Later, after the family viewing hour was struck down by the court, the networks said they were voluntarily reducing the amount of violence shown on television.[39] But broadcasters had a reason for such compliance. It was during this period that cable began to pose a competitive threat to broadcasters; this may explain broadcasters' efforts to please their regulators.

Summary

Although a cause-and-effect relationship cannot be established from a review of federal documents, the documents nonetheless suggested that the FCC of the late 1970s was in harmony with Congress -- or at least more willing to comply with Congress' regulatory goals the FCC of the latter 1980s proved to be. For example, in 1978, the FCC decided to assess the effectiveness of the recommendations it had set forth in its Report and Policy Statement of 1974. It issued a Notice of Inquiry to solicit comments about broadcasters' compliance with the policy and established a Children's Television Task Force. The task force found that educational programming had not increased significantly from 1974 to 1978.[40] In turn, the full commission proposed quantitative children's programming guidelines.[41]

Of course, other regulatory players, such as the citizen group ACT, likely influenced the FCC also. The main point to be made here is that the FCC did not disregard congressional policy goals. The evidence suggests the FCC of the late 1970s was responsive to Congress' desires with regard to children's television regulation.

Congress and the FCC: The 1980s

Background: 1980-1984

The new decade brought a new president, Ronald Reagan, who supported sweeping deregulation. Reagan's appointee to the FCC chairmanship, Mark S. Fowler, naturally shared the president's views.[42] The shift in regulatory philosophy meant the children's

television issue was assigned a low priority at the FCC.[43] Under Fowler, the commission voted to rescind the Report and Policy Statement of 1974.[44]

Other evidence of the FCC's deregulatory stance in the first half of the 1980s was plentiful. In 1981, the commission repealed the need for radio broadcasters to keep program logs and eliminated guidelines regarding nonentertainment programming, commercialization and ascertainment of important community issues.[45] In 1984, the commission eliminated commercialization and programming guidelines for television broadcasters, and abolished the ascertainment requirement. The commission boldly proclaimed its new philosophy in the decision:

> Our action today constitutes another step in the deregulation of the telecommunications industry. It reflects the importance and viability of market incentives as a means of achieving our regulatory objectives and will provide television broadcasters with increased freedom and flexibility in meeting the continuously changing needs of their communities.[46]

Thus, at mid-decade, the FCC was confident the marketplace would ensure that broadcast audiences got what they wanted. Congress, too, was ready to begin deregulating the airwaves, but some members wanted to proceed more rapidly than others, making the early 1980s a transitional period in broadcast regulation. The rift appeared to be a partisan one, with the Republican-controlled Senate (taking its cue from the Republican-occupied White House) prepared for more extensive deregulation than the Democrat-controlled House. Nonetheless,

the Omnibus Budget Reconciliation Act of 1981 contained provisions that extended the licensing terms for broadcast stations from three years to seven for radio stations and five for television stations.[47]

Republican interest in deregulation was characterized by the Senate's Broadcast Deregulation Act of 1981.[48] The bill would have required the FCC to renew broadcast licenses as long as stations had committed no serious violations of the Communications Act. It also would have relieved radio stations of several regulatory requirements: the need to provide news and public affairs programming, the need to maintain program logs, restrictions on the scheduling of commercial matter, and the need to ascertain community problems, needs and interests. This legislative bid to deregulate radio did not achieve the success that the FCC's previously mentioned initiative did; the bill passed in the Senate but died in the House.

House hearings about other broadcast deregulation measures gave clues about the nature of the opposition encountered there. Democrat Timothy E. Wirth was chairman of the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce. At a 1981 hearing to consider three broadcast deregulation bills, he expressed concern over a Republican-sponsored proposal to eliminate certain regulatory requirements.[49] Wirth was even more critical of Republican deregulatory proposals at a hearing the following year. Republican-sponsored legislation that would modify license renewal procedures was under consideration. Wirth stated:

As long as I am chairman of this subcommittee, I will

> do everything I can to prevent the passage of such sweeping, ill-conceived deregulatory measures that do not provide some alternative means of protecting the public interest.[50]

The bills introduced at the two hearings just mentioned did not become law. The fact that efforts were made to use legislation as a regulatory tool, however, distinguished this period of congressional activity from the 1970s, when nonstatutory pressures prevailed. The bills also indicated that the FCC was aligned with deregulatory agenda of Republican members of Congress. As the decade wore on, Congress' inability to pass legislation aimed at broadcast regulation would prove a major obstacle to forcing an uncooperative FCC into compliance with Democratic initiatives for children's television programming.

Years Under Scrutiny: 1985-1989

Congress and the FCC

Congressional use of legislation as its regulatory tool of choice continued into the second half of the decade. The new tactic was applied to children's programming, as illustrated by the Children's Television Act of 1985. The bill, H.R. 3216, introduced by Wirth, stated as its purpose "to amend the Communications Act of 1934 to increase the availability of educational and informational television programs for children." It also spelled out its sponsors' dissatisfaction with the FCC:

> [T]he Federal Communications Commission, in concluding its proceeding on children's television,

> has declined to take effective steps to increase educational and informational programming designed for children on commercial television and has instead rendered broadcasters' obligations to serve children vague and unenforceable.[51]

The bill would have required the FCC to conduct a hearing at license renewal time if a television station had failed to broadcast a minimum of seven hours of children's programming a week, five hours of which were to be aired Monday through Friday.[52] The bill also would have forced the commission to conduct an inquiry into program-length commercials aimed at children 12 and younger.[53]

Additional dissatisfaction with FCC policy was voiced at a House subcommittee hearing to consider the bill. In his opening remarks, Rep. John Bryant, the presiding officer, stated:

> [T]he public interest demands television programming or children. Today the FCC prefers to rely on "marketplace competition" rather than rules or regulations to insure that broadcasters meet their public interest obligations. In many areas, that approach is effective. In the case of children's programming, it clearly is not.[54]

The bill died in the 99th Congress. It is not surprising, in that Republicans controlled the White House and Senate. But that changed in the 100th Congress, making regulation by legislation more politically feasible -- at least theoretically -- than it had been during Reagan's first term. The 1986 congressional elections shifted the balance of power: Democrats

now controlled both houses of Congress, but a Republican was still in the White House. Despite the change in congressional membership, the scene would again prove to be set for the failure of legislation aimed at reregulating children's television.[55]

Three new bills aimed at regulating aspects of children's television were introduced to the 100th Congress. A hearing was conducted in the first session to consider one such bill, and the tone of the forum was one of growing bitterness toward the FCC. Rep. Edward J. Markey began the hearing by stating:

> It is not surprising ... that like a stubborn child, the Commission has refused to act. The Reagan era FCC has shown [a] disquieting tendency to ignore procedures and clear congressional commands in pursuit of its own narrow, ideological agenda.[56]

Markey's bill aimed to reinstate the commission's 1974 commercial guidelines for children's television. It explicitly stated that the commission had erred in repealing the guidelines, making it necessary for Congress to force reregulation of the matter. The bill would have limited the duration of advertising in children's programs to 9.5 minutes per hour on weekends and 12 minutes per hour on weekdays; required the separation of commercials from program content with an appropriate visual, aural or other type of device; and would have eliminated practices that used program characters to promote products.[57]

In the second session of the 100th Congress, two more bills to regulate children's television were introduced. One, H.R.

3966, was similar to the Markey proposal in that it would have required the FCC to reinstate the restrictions on advertising during children's television. The new proposal, sponsored by Rep. John Bryant, also would have enforced the obligation of broadcasters to meet the educational and informational needs of child viewers by requiring television stations to air a "substantial amount" of programming that served children 12 or younger. It also specified that the programming be "reasonably scheduled throughout the week" and directed to specific age groups of children. The bill called upon the FCC to write any regulations needed to carry out the plan.[58]

The other bill introduced during the second session, H.R. 4125, would have exempted television broadcasters from the Communications Act's antitrust provisions to allow them to work together on voluntary guidelines to promote the educational impact of television for children and to "avoid abusive advertising practices during such programming."[59] At a hearing to consider these two bills as well as the Markey proposal, dissatisfaction with the FCC again was voiced. Rep. Al Swift said:

> We're here because the FCC hasn't been doing its job ... It leaves the Congress in a position of playing chicken with the FCC again. They're daring us to pass legislation.[60]

Both H.R. 3288 and H.R. 4125 died in committee, but H.R. 3966, the "Children's Television Practices Act of 1988," made it all the way to Reagan's desk before expiring from lack of the president's signature. Thus 100th Congress ultimately could not

force a recalcitrant FCC to cooperate. This "powerful determiner of regulatory policy," as Krasnow, Longley and Terry called it, failed because another determiner -- the White House -- had another agenda and the political clout to enforce it.

Other Regulatory Players

Reagan paid much more attention to communications issues than did his predecessors. He appointed an FCC chairman, Fowler, who heartily endorsed and carried out the president's deregulatory views. Fowler served for an unprecedented six years, eliminating or relaxing regulations in an effort to achieve a competitive broadcast marketplace.[61] In setting policy, the FCC was taking its cue from the White House instead of Capitol Hill. Moreover, the White House provided essential backing to the FCC. For example, in 1983 Reagan appointed Dennis Patrick to the commission, a man who shared the president's views and would eventually succeed Fowler as chairman. Reagan also vetoed Congress' attempt to codify the Fairness Doctrine, decrying the bill as "antagonistic to the freedom of expression guaranteed by the First Amendment."[62]

Broadcasters, however, complained of no such philosophical rift with Congress. The National Association of Broadcasters, the main trade group for commercial broadcasters, had found the Children's Television Practices Act of 1988 acceptable. Once again, it was compliance with a motive. The NAB had hoped such a stance would inspire Congress to support broadcasters by passing legislating to require cable companies to carry local television stations on their channels.[63]

The citizen group ACT continued its litigious involvement with broadcast regulation in the late 1980s. It filed suit against the FCC in federal district court in Washington, D.C., challenging the commission's withdrawal of children's television commercialization guidelines. The court ruled in June 1987 that the commission had failed to adequately justify deregulation and remanded the issue to the commission for elaboration. The court stated:

> [W]ithout explanation, the Commission has suddenly embraced what had theretofore been an unthinkable bureaucratic conclusion that the market did in fact operate to restrain the commercial content of children's television.[64]

In response to the district court ruling in 1987, the FCC issued in November 1987 a Notice of Proposed Rule Making/Notice of Inquiry to solicit comments about commercialization guidelines for children's television. The filing deadline for comments was Feb. 18, 1988. The commission took no further action on this matter in the 1980s.[65]

Congress and the FCC: The 1990s

White House leadership has changed since the defeat of the 1988 act, and so too has the broadcast regulatory scene. A new law requires commercial television broadcasters to limit the duration of advertising in children's programming to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays. In addition, the law requires the FCC to consider, during its review of television broadcast licenses, whether the

station has served the educational and informational needs of children in its overall programming.[66]

The law became effective in October 1990 without President George Bush's signature; thus its passage does not necessarily signal a new era for regulation of children's television. Although Bush stopped short of vetoing the legislation, he indicated he does not support it. Bush remains skeptical about the constitutionality and efficacy of the measure. First, he believes that the First Amendment precludes government intervention in media content. Second, he thinks that, to the extent broadcasters rely on advertising revenues to support children's programming, the act's commercial limits will reduce, rather than enhance, the quantity and quality of children's programming.[67]

The Bush FCC, however, voiced unanimous support for the new legislation at an April 1991 meeting. Commission Chairman Alfred C. Sikes, who has a reputation as a deregulator,[68] said of the act: "The end result is that a lot of broadcasters will have a lot more educational and informational programing [sic] available to children."[69]

In summary, it must be noted that although the regulatory bill has become law, the time and effort it has taken Congress to influence children's television regulation in the face of an uncooperative FCC underscores the change in the relationship between the two players in the broadcast regulatory process.

Conclusion

The FCC's regulatory agenda in the latter half of the 1980s

was to promote deregulation on many fronts, including children's television. This agenda was set in large part by President Reagan, who took a more active interest in communication than did his predecessors. Reagan appointed Mark S. Fowler, a loyal deregulator, as chairman of the FCC, and Fowler carried out the president's agenda. Another adherent to the marketplace approach to broadcasting, Dennis Patrick, succeeded Fowler.

In contrast, Congress -- with both houses now controlled by the Democrats -- sought in the late 1980s to regulate children's television programming content and its level of commercialization. Clearly, the Democrats' goals were diametrically opposed to those of the president and his FCC appointees. Congress abandoned its traditional broadcast regulation approach of bringing nonstatutory pressure upon the FCC and instead tried to pass laws to force the FCC to do its bidding.

This research supports the conclusion that the commission prevailed in large part because it formed an alliance with another player -- a strong president. Unlike other recent presidents, Reagan took an active interest in communication policy. He appointed resolute chairmen who implemented his policy. FCC policy was very much Reagan policy and the White House responded with appropriate support.

With a strong president behind it, the FCC was able to disregard pressures from other regulatory players with apparent impunity. For example, alliance with a president who sought deregulation insulated the FCC from congressional pressures in several respects. First, the commission was able to ignore

pointed criticism from members of Congress -- the kind of criticism it seemed to take seriously in the late 1970s. Second, because the commission promoted deregulation, its chairman questioned the very existence of the regulatory agency and reduced staff accordingly. An agency that is downsizing probably is not vulnerable to budget cuts. Thus Congress' power of the purse -- one of its traditional nonstatutory controls over the FCC -- was benumbed. Third, the FCC's alliance with the president protected it from congressional attempts to override commission policy with legislation. Reagan refused to sign legislation that conflicted with his policy of broadcast deregulation.

In addition, alliance with the president may have made it easier for the FCC to ignore two other players: courts and a citizen group. Although ACT brought a successful court challenge against the FCC's children's television policy, the commission failed to respond meaningfully to the court order. The commission seems fully aware of the court's lack of enforcement power. Furthermore, neither the president nor the FCC seemed to see a need to respond to ACT's pressure.

This research has shown that, given a powerful president with a broadcast agenda of his own, Congress could not even guide broadcast policy in the direction it wanted. It suggests the president has the power to dominate the regulatory process at times, but conclusions about the president's power must be drawn with caution due to the limitations of the case study methodology employed in this study. Presidential influence on

broadcast regulatory policy, particularly during the Reagan administration, would be a worthy topic for future research.

These observations about Congress' power over the regulatory process are particularly significant in that they depart from the findings of previous studies, which generally portrayed the federal legislature as a very powerful player in the process. This research has highlighted the weakness of the legislature as a broadcast regulator.

Any speculation about the implications of these findings must be tempered with a reminder that the regulatory process is influenced by many factors that change constantly. What is true about the process today may not be tomorrow, due to unforeseen developments. However, this research suggests that citizens who seek to influence broadcast regulation in the present political situation might enhance their chance for success by cultivating the support of President Bush as well as Congress. It does not appear that Congress can regulate through statute without at least the president's tacit approval. In addition, the courts do not seem effective in promoting change at the FCC. The president clearly can be a powerful player in today's regulatory dynamic.

NOTES

1. E. Krasnow, L. Longley & H. Terry, The Politics of Broadcast Regulation 88 (3d ed. 1982). These committees include the Senate Commerce Committee, House Interstate and Foreign Commerce Committee and the communications subcommittees.

2. Id. at 33. In a personal communication with the author on Oct. 10, 1990, Terry said that adjustments to the model are being considered. They are minor relative to this study.

3. See, e.g., Uscinski, "Deregulating Commercial Television: Will the Marketplace Watch Out For Children?" 34 Am. U.L. Rev. 141 (1984); Versfelt, "Constitutional Considerations of the Children's Television Act of 1988: Why the President's Veto Was Warranted," 11 COMM/ENT 625 (1989); and Watkins, "Improving Educational and Informational Television for Children: When the Marketplace Fails," 5 Yale L. & Pol'y Rev. 345 (1987).

4. Dyk & Goldberg, "The First Amendment and Congressional Investigations of Broadcast Programming," 3 J. Law & Politics 625 (1987).

5. Shooshan & Krasnow, "Congress and the Federal Communications Commission: The Continuing Contest for Power," 9 COMM/ENT 619 (1987).

6. Krasnow & Shooshan, "Congressional Oversight: The Ninety-Second Congress and the Federal Communications Commission," 26 Fed. Comm. Bar J. 81 (1973) at 82.

7. Tucker & Saffelle, "The Federal Communications Commission and the Regulation of Children's Television," 26 J. Broadcasting 657 (1982).

8. McGregor, "Assessing FCC Response to Report of Children's Television Task Force," 63 Journalism Q. 481 (1986). See also Atkin & Lin, "Children's Programming Reconsidered," 10 Comm. & the Law 3 (October 1988) for an analysis of requirements that broadcasters provide a specified minimum of children's television programming.

9. Kunkel & Watkins, "Evolution of Children's Television Regulatory Policy," 31 J. Broadcasting & Electronic Media 367 (1987).

10. E. Krasnow, L. Longley and H. Terry, supra note 1, at 33.

11. 47 U.S.C. Sec. 151 (1982).

12. 47 U.S.C. Sec. 301 (1982).

13. 47 U.S.C. Sec. 303 (1982).

14. E. Krasnow, L. Longley & H. Terry, supra note 1, at 21.

15. K. Middleton & B. Chamberlin, The Law of Public Communication (1988), at 532-4.

16. E. Krasnow, L. Longley & H. Terry, supra note 1, at 55-6.

17. 47 U.S.C. Sec. 155 (1982).

18. E. Krasnow, L. Longley & H. Terry, supra note 1, at 37-8.

19. Id. at 91-2.

20. Dyk & Goldberg, supra note 4, at 637.

21. Sex and Violence on TV: Hearings Before the Subcomm. on Communications of the House Comm on Interstate and Foreign Commerce, 94th Cong. 2d Sess. 2-3 (1976). The family viewing policy was challenged in Writers Guild of America v. FCC, 423

F.Supp. 1064 (C.D. Cal. 1976). The district court held that the policy violated the first amendment. However, the court of appeals reversed, holding that the matter should be referred to the FCC. Writers Guild of America v. FCC, 609 F.2d 355 (9th Cir. 1979), cert. denied 449 U.S. 824 (1980). The policy eventually was abandoned.

22. 20 F.C.C.2d 1 (1974) [hereinafter Report and Policy Statement of 1974].

23. Oversight of the Federal Communications Commission: Hearings Before the Senate Comm. on Commerce, 94th Cong., 1st Sess. 1 (1975)(statement of Sen. John O. Pastore).

24. 50 F.C.C.2d 1 (1974).

25. Oversight of the Federal Communications Commission: Hearing Before the Senate Comm. on Commerce, 94th Cong., 1st Sess. 3 (1975).

26. 51 F.C.C.2d 418 (1975).

27. Oversight of the Federal Communications Commission: Hearing Before the Senate Comm. on Commerce, 94th Cong., 1st Sess. 4 (1975).

28. Broadcast Advertising and Children: Hearings Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess. 372 (1975).

29. Id. at 375.

30. E. Krasnow, L. Longley & H. Terry, supra note 1, at 112-13.

31. Impact of Television on Children: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, 94th Cong. 2d Sess., 1 (1976).

32. Sex and Violence on TV: Hearings Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce, 94th Cong. 2d Sess. 4 (1976)(statement of Rep. Timothy E. Wirth).

33. Id. at 4-5.

34. Television Broadcast Policies: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 95th Cong. 1st Sess. 1-2 (1977).

35. Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1977: Hearings Before a Subcomm. on Appropriations of the House Comm. on Appropriations, 94th Cong. 2d Sess. 1261-1324 (1977).

36. 33 Congressional Quarterly Almanac 528 (1977).

37. E. Krasnow, L. Longley & H. Terry, supra note 1, at 41-5. During his last days in office, Ferris tried to persuade the commission to eliminate some radio regulations. Broadcasting, Jan. 12, 1981, at 27.

38. Action for Children's Television v. Federal Communications Commission, 564 F.2d 458 (D.C.Cir. 1977), 458-9.

39. Almanac, supra note 36, at 565.

40. Television Programming for Children: A Report of the Children's Television Task Force, 1979.

41. Children's Television Programming and Advertising Practices, 75 F.C.C.2d 138 (Notice of Proposed Rulemaking 1980).

42. McGregor, supra note 8, at 482.

43. Id.

44. Children's Television Programming and Advertising Practices, 96 F.C.C.2d 634 (1983).

45. Deregulation of Radio, 84 F.C.C.2d 968, 971 (1981).

46. Deregulation of Commercial Television, 98 F.C.C.2d 1076, 1077 (1984).

47. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, ch. 2, 95 Stat. 736 (1981).

48. H.R. 1629, 97th Cong., 1st Sess. (1981). The bill was introduced by Sen. Howard Cannon, a Nevada Democrat, with Republican co-sponsors Bob Packwood, Barry Goldwater and Harrison Schmitt and Democratic co-sponsor Ernest Hollings.

49. Broadcast Reform Proposals: Hearings on H.R. 4726, H.R. 4780 and H.R. 4781 Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the Comm. on Energy and Commerce, 97th Cong., 1st Sess. 2 (1981).

50. Broadcast Regulation Reform Proposals: Hearings on H.R. 4726, 5242, 5584, 5585 and 5752 Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the Comm. on Energy and Commerce, 97th Cong., 2d Sess. 2 (1982).

51. H.R. 3216, 99th Cong., 1st Sess. (1985). The proceeding referred to was the docket under which children's television programming was reviewed -- the docket that was closed by Children's Television Programming and Advertising Practices, 96 F.C.C.2d 634 (1983).

52. Id. at 4-5.

53. Id. at 6.

54. Improving Children's Television Programming Content: Hearing Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce, 99th Cong., 1st Sess. 3 (1985).

55. Statistical Abstract of the United States: 1989 250 (109th ed. 1989).

56. Commercialization of Children's Television: Hearing on H.R. 3288 Before the Subcomm. on Telecommunications and Finance of the Committee on Energy and Commerce, 100th Cong., 1st Sess. 2 (1987).

57. H.R. 3288, 100th Cong., 1st Sess. 2-3 (1987).

58. H.R. 3966, 100th Cong., 2d Sess. 6-7 (1988).

59. H.R. 4125, 100th Cong., 2d Sess. 2 (1988). The bill would have modified 47 U.S.C. Sec. 313 (1982).

60. Commercialization of Children's Television: Hearings on H.R. 3288, H.R. 3966 and H.R. 4125 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 100th Cong., 2d Sess. 155 (1988).

61. Broadcasting, April 10, 1989, at 28.

62. 43 Congressional Quarterly Almanac 18-D (1987).

63. 44 Congressional Quarterly Almanac 578-9 (1988).

64. Action for Children's Television v. Federal Communications Commission, 821 F.2d 741, 746 (D.C.Cir. 1987). For a discussion of the different philosophies of the FCC and the D.C. Circuit Court of Appeals in the late 1980s, see Trauth & Huffman, "A Case Study of a Difference in Perspectives: The DC Circuit Court of Appeals and the FCC," 33 J. Broadcasting & Electronic Media 247 (1989).

65. 2 F.C.C.Rcd. 6822 (1987).

66. Pub. L. No. 101-437, 104 Stat. 998 (1990).

67. Broadcasting, Oct. 22, 1990, at 35.

68. Broadcasting, Aug. 14, 1989, at 29.

69. Broadcasting, Apr. 15, 1991 at 90.